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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD OF THE 467th MEETING

Held at Headquarters, New York,
on Monday, 4 May 1992, at 10.30 a.m.

Temporary Chairman: Mr. HERRMANN (Secretary of the Commission)

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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The meeting was called to order at 11.10 a.m.

OPENING OF THE SESSION

1. The TEMPORARY CHAIRMAN said that the twenty-fifth session of the United Nations Commission on International Trade Law (UNCITRAL) would be important not only because it marked the Commission's silver jubilee, but also because the Commission expected to complete its work on two major texts, namely, the draft Model Law on International Credit Transfers and the draft Legal Guide on International Countertrade Transactions. The Commission would also consider a number of other important issues.

2. The Congress on International Trade Law would be held during the last week of the session. The UNCITRAL secretariat had prepared an interesting programme for the Congress, which included over 60 speakers. The secretariat had decided that no official conclusions should be drawn and no resolutions should be adopted at the Congress, which should rather take the form of a free-wheeling dialogue. At its next session, the Commission could consider how to make the best use of the positive results of the Congress in its future programme of work.

ELECTION OF OFFICERS

3. Mr. Abascal Zamora (Mexico) was elected Chairman by acclamation.

4. Mr. Abascal Zamora (Mexico) took the Chair.

ADOPTION OF THE AGENDA (A/CN.9/355)

5. The agenda was adopted.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

6. The CHAIRMAN said that, at its twenty-fourth session, the Commission had briefly considered article 16 of the draft Model Law on International Credit Transfers, and had decided to resume consideration of the article as well as the proposal made by the United Kingdom and Finland to replace the existing article with the text contained in paragraph 278 of the UNCITRAL report (A/46/17). In connection with article 16, he drew the Commission's attention to the definition of "interest" contained in paragraph 92 of the Commission's report.

7. Mr. GREGORY (United Kingdom) said that article 16 was based on the principle that, when a credit transfer was completed but some delay had occurred, the bank that caused the delay was obliged to pass interest down the chain to the beneficiary. Article 16 also dealt with liability for failure to comply with certain other obligations contained in the draft Model Law, such as the obligation of banks to give notice, in certain circumstances, of

(Mr. Gregory, United Kingdom)

discrepancies that they might detect in payment orders that they received. In that case, the principle was different: the interest passed from the bank that failed to comply with the notification requirement back to its sender. The Commission should bear in mind that article 16 dealt with two situations, namely, the need to pass interest to the beneficiary for delay in execution and the need to pass interest back to a sender when a receiving bank failed to comply with the notification provision.

8. After reviewing the provisions of article 16 as set out in annex I to document A/46/17, he said that the new version prepared by the United Kingdom and Finland was intended to reflect the decisions taken by the Commission on articles 1 to 15, and also to make the existing provisions of article 16 more logical.

9. Introducing the revised text of article 16 (1) (as set out in document A/46/17, para. 278), he said that none of the changes were substantive. The first sentence, rather than referring to a receiving bank's "failure to execute", as in the current text (set out in annex I to document A/46/17), referred to failure "to comply with its obligations under article 7 (2)". The requirement in article 7 (2) that the receiving bank should issue a payment order consistent with payment received established the essential chain of obligations. The changes made the first sentence of article 16 (1) more precise.

10. While the second sentence was unchanged, the third sentence was completely revised. The current text, which stipulated the mechanics of the discharge of liability, belonged more logically in article 16 (2); the revised text stated what should be done if too little had been paid, a point currently dealt with in article 16 (5). He proposed that the Commission should adopt article 16 (1) as revised.

11. Mr. BURMAN (United States of America) said that while his delegation would withhold its position on a possible problem in article 16 (2) until it was clear how the full text of article 16 would read, he wished to suggest the possibility of including in paragraph 2 language already approved in two previous articles, regarding the protection of the rights of parties to a credit transfer who might be precluded from the non-payment of interest that was authorized in article 16 (2).

12. Mr. EL-SHARKAWY (Egypt) asked whether, as new article 16 (2 bis) implied, the liability of a receiving bank under article 16 (1) was an objective liability, which did not require any proof of fault.

13. The CHAIRMAN said that, indeed, the Working Group had intended it to be an objective liability.

14. Mr. FUJISHITA (Japan) said that he saw two problems with both the current and the revised texts. He noted that in the current text of article 16 all reference to damages - the cost of reissuance of payment orders and the cost

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of lawyers' fees - had been deleted, and he wondered why that had been done, in view of the crucial provision in current article 16 (8) regarding the exclusiveness of remedies for damages. If the current version of article 16 was retained, a reference to such damages would have to be added in article 16 (1). If, however, the United Kingdom/Finland revision of article 16 was adopted, in which current paragraph 8 was deleted, he could support the revised text of paragraph 1 as proposed.

15. Another problem arose in the third sentence of new article 16 (1) the liability referred to was, pursuant to the first sentence, contingent upon completion of the credit transfer under article 17 (2). However, in a case where the beneficiary's bank received only a partial payment order, the credit transfer would presumably still be considered completed under the terms of article 17 (2), making that bank liable. As he recalled it, it had been decided not to include the "partial completion" concept in article 16 (1) because of such a possibility.

16. The CHAIRMAN said that any specific reference to damages had been deleted from the current text of article 16, because it had been felt that the cost of issuance of a new payment order was too small to be worth mentioning, and because the payment of lawyers' fees had been deemed to be a matter for national legislation and not for the Model Law. At one point, a footnote to that effect had been part of the article.

17. As to partial payment orders, which were dealt with in current article 16 (5), the matter would have to be considered in conjunction with both article 14 and article 17 (1).

18. Mr. BERGSTEN (Consultant to the Secretariat) said that the provisions concerning the discharge of the obligation of the originator to the beneficiary were currently in article 16 (2).

19. Mr. GREGORY (United Kingdom) said that earlier references to legal expenses had indeed been deleted, but not merely because they were only a minor element or a matter for national legislation. They had been deleted because of a change of philosophy at the last meeting of the Working Group. Article 16 had gone from being a fault-based provision involving the concept of damages to a provision which depended only on an objective failure to comply, rather than on fault or loss or assessment of loss. Article 16 dealt with interest which was earned by a delaying bank and which must be passed down. He agreed that current paragraph 1 had to be seen in the light of current paragraph 8, where it would be appropriate to discuss Japan's wish to reintroduce the reference to damages. Revised paragraph 1 dealt only with interest.

20. The second question raised by Japan regarding the possibility of partial completion of a payment order would come under article 17; and article 16 (1) was currently based on article 17 as drafted by the Working Group. In any case, the basic principle on which all were agreed was that article 16 (1)

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applied if the beneficiary's bank accepted a payment order which was the result of the chain of liability that began with the originator's payment order.

21. Mr. LOJENDIO (Spain) said that one point remained unclear in both the current and the revised texts of article 16 (1), which established a distinction between the obligation to pay interest and the liability to the beneficiary. It was not clear, from the third sentence of the current text, who would be liable to the beneficiary. It seemed logical that the bank which received the interest would be liable, but that had to be spelt out clearly, as did the fact the beneficiary could claim a remedy from either the bank that had failed to comply or the receiving bank.

22. Mr. SCHNEIDER (Germany) said that article 16 (1) raised two problems. First, he did not see why the receiving bank should be liable only to the beneficiary and not to the originator or the issuing bank. His delegation believed the obligation involved was a contractual one, although the Working Group considered it a statutory duty. Even so, given the right of the beneficiary to ask for damages in a case of delayed payment from either the originator or the receiving bank, a serious problem could arise for the originator if the beneficiary opted for the first course, because the originator at the moment had no way to claim reimbursement from the receiving bank. The beneficiary should not have sole rights in the matter.

23. Secondly, the concept of objective liability was not clearly defined in article 16. If a receiving bank was deemed to have been unjustly enriched as a result of its failure to execute a payment order, then it should be given the possibility of showing that it had not been so enriched. In his view, a receiving bank should be liable only where its failure to execute an order was negligent or intentional. He did not support the notion of objective liability.

24. The CHAIRMAN said that, in view of the current practice of receiving banks passing orders for payment and the corresponding interest on to the next receiving bank in the chain, the Working Group, in article 13 (1), provided for the right of the originator of a payment to receive interest from a receiving bank which failed to execute the order.

25. As far as objective liability was concerned, the Working Group had concluded that a receiving bank which failed to execute an order incurred liability, which was limited, however, to the payment of interest and did not extend to other indirect or consequential damages.

26. Mr. VASSEUR (Observer, Banking Federation of the European Community) said that his organization, which spoke for almost all Western European banks, had difficulty with the idea that a receiving bank should be liable for interest if it failed to execute a payment order. That position assumed that the bank had had the money at its disposal and had unjustly enriched itself. However, the bank might have been advancing the money and, although it had undertaken

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to execute a payment order, it might not actually have had the originator's funds at its disposal. He wished to know whether article 16 contemplated such a situation.

27. The CHAIRMAN said that, in considering the question of liability, the Working Group had dwelt not on the notion of unjust enrichment, but on the extent of liability. It had felt that if a bank undertook to execute an order, it had an objective liability and was therefore liable for the payment of interest whether or not it had actually received the funds in question.

28. Mr. SCHNEIDER (Germany) said that article 13 (1) covered a situation in which a transfer had not been completed, while article 16 (1) contemplated a situation in which a payment order was executed but not in due time. In the latter case, article 16 (1) provided that interest should be paid only to the beneficiary and not to the originator. In his view, the provision for the payment of interest should also extend to the originator.

29. As for the concept of objective liability, he recalled that the Working Group had earlier proposed that there should be a series of exceptions covering, for example, cases where, on account of war, it was impossible to execute an order. The Commission should either reopen consideration of exceptions to liability or embrace the concept of liability where there was fault.

30. The CHAIRMAN, while noting the suggestion of the representative of Germany that the Commission should reopen consideration of exceptions to liability, pointed to the differences between the situations provided for in articles 16 (1) and 13 (1), and proposed that the matter should be referred to the Drafting Group.

31. Mr. EL-SHARKAWY (Egypt) said that the question of unjust enrichment simply did not arise, since there should be no need to prove negligence or fault.

32. Ms. KOSKELO (Observer for Finland) said that the situation adverted to by the representative of Germany, in which a beneficiary claimed interest from the originator of an order on account of a delay in transfer, had been contemplated in paragraph (2 ter) of the proposed revised version of article 16.

33. With regard to the determination of liability, there were very good reasons for using the yardstick of objective liability. The conceptual framework of damages and unjust enrichment did not inform article 16. The Working Group had simply concluded that a party which was holding funds was in a position to benefit from those funds and therefore had an obligation to pay compensation for its failure to execute. The reason for such failure was irrelevant.

34. Mr. GREGORY (United Kingdom) said that he fully shared the view just expressed by the representative of Finland concerning the basis for liability. The Model Law was being codified in an age of high-speed electronic transfers, and the Commission should not necessarily be bound by concepts of municipal law such as unjust enrichment and negligence. Objective liability based on the simple calculation of interest would be a much easier system to operate.

35. Mr. LE GUEN (France) agreed that the receiving bank should be objectively liable for payment of interest where it failed to execute a payment order, without regard to unjust enrichment or fault. Several grounds for the liability of receiving banks, including liability for losses due to variations in the foreign exchange rate, had been eliminated from the draft text. That was all the more reason why the liability regime retained in the draft should be stricter.

36. He cautioned that any changes to draft articles 16, 17, and, to some extent, 18 might have consequences for the remainder of the text, on which broad agreement had already been reached.

37. Mr. FELSENFELD (United States of America) said that he shared the views expressed by the representatives of the United Kingdom, Finland and France. The draft Model Law proposed a harmonious, realistic and rational system based on the premise that a bank which held funds beyond the time during which it was authorized to do so was liable for interest. If the originator's bank did not hold funds, it would not be so liable. To provide for exceptions would be to introduce unnecessary turmoil into the system.

The meeting rose at 1 p.m.